# In the Supreme Court of the United States.

OCTOBER TERM, 1898.

S. ENDICOTT PEABODY, appellant, v. THE UNITED STATES. } No. 268.

*VALLECITO DE LOBATO GRANT IN NEW MEXICO.*

**APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.**

**BRIEF ON BEHALF OF THE UNITED STATES.**

## STATEMENT.

Three separate petitions were filed in the Court of Private Land Claims, seeking confirmation of what is commonly known and called the Vallecito de Lobato grant. The first was filed on February 28, 1893, by Merijildo

Martinez and others, alleging an interest by inheritance in the said tract of land, containing about 114,400 acres and situated in the county of Rio Arriba and Territory of New Mexico, known as No. 142 on the docket of the Court of Private Land Claims (R., 1–3). The second was filed on March 2, 1893, by S. Endicott Peabody, claiming the ownership of said tract, numbered on the docket of the Court of Private Land Claims as 204 (R., 3–5); and the third was filed on March 3, 1893, by José Salazar y Ortiz, claiming an interest in said grant, and known on the docket of the Court of Private Land Claims as No. 236 (R., 5–7).

The three cases were ordered by the Court of Private Land Claims consolidated for the purpose of trial and to proceed as one case under the title of No. 142 (R., 17).

Afterwards, on April 2, 1897, S. Endicott Peabody filed an amended petition (R., 12–15), which was occasioned by an order of the court requiring certain adverse claimants to be made parties defendant. The allegations of this amended petition are the same as the principal allegations in the three original petitions, which are substantially as follows:

That on February 23, 1824, José Rafael Samora, a citizen and resident of Ojo Caliente, on behalf of himself and twenty-five other persons, citizens of the Republic of Mexico and residents of said district in the Territory of New Mexico, presented his petition for a grant to them of the tract thereinafter described, and called and known as the Vallecito de Lovato, through Francisco Trujillo, constitutional alcalde of the district of Santo Tomas, of Abiquiu and San Andres, to Bartolomé Baca,

the then governor and political chief under the Republic of Mexico of the said Territory of New Mexico, and on February 27, 1824, the said governor granted the prayer of said petition and made the grant of land therein asked for, and directed the said Francisco Trujillo, alcalde, to place the said grantees in possession of said land; and on September 22, 1824, the said Francisco Trujilco, alcalde as aforesaid, placed the said grantees in juridical possession of the same and duly executed his certificate thereof, which was presented to and approved by the said governor and political chief, and the same was delivered to the grantee, José Rafael Samora, for himself and his said associates.

That upon the making of said grant José Rafael Samora and his associates, the said petitioner and grantee, received possession of said tract of land, and they and their respective heirs, grantees, and legal representatives have ever since been and now are in the actual, open, and exclusive possession of the said land as the owners thereof, under and by virtue of said grant.

The petition then sets forth the boundaries and location of the tract claimed, and that the same was surveyed by authority of the Government of the United States and was thereby found to contain an area of about 114,000 acres.

It further states that the said grant was theretofore submitted to the surveyor-general for the Territory of New Mexico, under the provisions of the act of Congress of July 22, 1854, and said officer, on October 13, 1875, made his decision and report approving said grant, and recommended that the same be confirmed, and trans-

mitted his said report and recommendation to Congress for its final action, but no action has ever been taken by Congress in regard thereto; and that the said claim has never been submitted to any authorities of the United States constituted by law for the adjustment of land titles within the limits of said Territory, otherwise than as before stated; but that on May 12. 1886, the then surveyor-general of New Mexico made a report thereon, termed a supplementary opinion, unfavorable to said grant, and transmitted the same to Congress; but no action has ever been taken by Congress or any authority constituted by law for the adjustment of land titles within the limits of said Territory, otherwise than as before stated; and the petitioner alleged that the said so-called supplementary opinion of said surveyor-general was wholly unauthorized and invalid.

The answer of the United States (R., 16) put in issue generally the allegations of claimants' several petitions, and alleged as a matter of defense that Bartolomé Baca, the political chief at the date of the instrument alleged as grant, had no authority to make a grant, and even if he had, he failed to sign the paper presented as a grant, and that the paper presented as a grant was at best a mere license to occupy the land until proceedings could be initiated and consummated vesting title in the grantees.

On May 20, 1897, the separate answer of the United States Land and Colonization Company and Thomas B. Catron was filed in case No. 204, one of the consolidated cases (R., 18–20). This answer, after traversing specifically the allegations of the amended petition, sets forth the illegality and want of authority for the proceedings

alleged to have been had, and alleges the adverse interests of these defendants and the title under which they so claim.

On May 22, 1897, the same defendants filed their separate answer in case No. 142 (R., 20–23), being practically the same matter as in their former answer, though couched in different language to some extent.

On September 15, 1897, R. W. D. Bryan filed a petition setting forth the fact of his appointment as receiver of the interests of S. Endicott Peabody in said grant, that he be permitted to become a party plaintiff in said cause, and praying a continuance of the same to the next term of court, and attached thereto copies of proceedings had in the district court of the second judicial district of the Territory of New Mexico, showing the appointment as such receiver (R., 23–28), which petition was granted and an order entered accordingly (R., 31).

The claims of all the petitioners were based upon various interests, acquired by inheritance or purchase, from a large number of persons to whom the land was allotted in severalty by the alcalde Trujillo.

Mr. Clancy, counsel for Peabody, offered in evidence three original Spanish documents, being—

(1) Petition of Jose Rafael Samora for himself and twenty-five individuals of the same district, to the constitutional alcalde of Abiquiu, Francisco Trujillo, dated February 23, 1824, which purports to bear an original indorsement by Francisco Trujillo, as follows:

> I do hereby certify that the above is true and the land applied for public, and I do not recognize those applying for the same as property holders.

(2) Unsigned order, supposedly a rough draft of the order of possession by the political chief to Trujillo, dated February 24, 1824.

(3) The act of possession (so-called juridical) purporting to have been executed by Francisco Trujillo and Juan José de Arza, secretary of the Cabildo, and attested by two witnesses, dated September 22, 1824, to which offer objection was made by Mr. Catron as improper, incompetent, irrelevant, and impertinent, and as not establishing any valid or legal grant in accordance with the petition in this case, and as being no evidence of a grant; that the papers were not genuine, and the signature of the governor on the paper is not genuine.

Mr. Pope, on behalf of the Government, admitted that it (the act of possession) came from the surveyor-general's office, but declined to admit that the paper offered constituted one of the archives of the former government.

Mr. Catron objected to the paper because it was not signed by the governor nor anyone else, and admitted that it came from the archives, "but do not admit its genuineness" (R., 32, 23).

Mr. Howard, counsel for a number of plaintiffs and claimants, offered in evidence a paper purporting to be a list of persons included in the Vallecito grant.

The four documents are marked in the record "Plaintiff's Exhibit A" (R., 38–41).

As an order has been made for transmission to the clerk of this court of the four original Spanish documents relied upon as evidence of title, it is deemed proper at this point to describe them fully.

First. The original petition by Samora and twenty-five others to Trujillo, the alcalde, dated at Abiquiu, February 23, 1824, upon which is a certificate of Alcalde Trujillo that the land was vacant and petitioners were without lands. This document is found among those official archives which were selected by two clerks of the first surveyor-general of the Territory, from the archives in the custody of the governor, one of whom was Mr. David Whiting, the chief clerk at that time; this petition was given the number "898" in red ink, at the top, and has been since known as archive "898." The letter "A," just above, in red ink, was placed there by Mr. William M. Tipton to distinguish it from the second document, which bears the number "898" in red ink, which is the unsigned draft of the order for possession. The case or cover in which these two instruments are held bears indorsement in the handwriting of Mr. Whiting, the first chief clerk, as follows:

"1824. Petition. Jose Rafael Samora and others. February 23. Land in Rio Arriba County," and in red ink the large figures "898."

Just below it has indorsement in the handwriting of Mr. David Miller, for many years chief clerk.

"Transferred to private land claim reported as No. 108 in name of Jose R. Samora."

The number "898," in red ink, on the side of the petition is in the handwriting of P. H. Warner, who was formerly a clerk in the office of the surveyor-general. The number "898," in red ink, on the unsigned draft of the order for possession appears to have been traced over

pencil marks, and Mr. Tipton is of opinion the penciled number is in the handwriting of Mr. Whiting.

The other two documents, respectively the act of possession, dated September 22, 1824, and the list of allotments, do not have any archive numbers. It is contended by the Government that neither of these constitutes part of the archives, but were filed in the case instituted before the surveyor-general on May 20, 1875, under the law of July 22, 1854.

As these original documents are before the court, it is deemed proper to set forth a copy of the petition filed before the surveyor-general under the law of 1854, under which the claim was first considered by the Government.

Hon. JAMES K. PROUDFIT,
*U. S. Surveyor-General for New Mexico.*

Your petitioners, the inhabitants of the town of Vallecito, in the county of Rio Arriba, in this Territory, respectfully represent to your honor:

That they are the owners in fee, and are and for the last fifty years have been in the quiet, peaceable, undisputed, and uninterrupted possession and enjoyment of a certain tract of land in said county, the boundaries of which are: On the north, the source of the Ojo Caliente River; on the east, the table-land of the Jara; on the south, the point on said river known as the Little Ford; and on the west, the mountain ridge known as the Horse Valley Ridge, embracing an area of about 30,000 acres, and all of which boundaries are points well known and easily found.

That your petitioners claim said la nd under a certain granting decree made in the year 1824 by the governor of New Mexico, then one of the territories

of the Republic of Mexico, and also in virtue of the continuous, legal, and undisputed possession thereof which they and their ancestors have held from the time of the said original concession to this present day, and also under the treaty of Guadalupe Hidalgo, stipulating and guaranteeing intact the rights of Mexican citizens in New Mexico.

That your petitioners herewith file the original and sworn translation of the original documents constituting their title, and also refer to document No. 898, among the archives of your office, as corroborative of said title, which document No. 898 your petitioners pray may be taken from among said archives and placed with and made a part of said claim; and they also herewith file a sketch map of the tract of land claimed by them as aforesaid.

That the number of permanent residents upon and occupants of said tract of land is not less than four hundred people, many of whom are engaged in the cultivation of the land and in the raising of live stock which they pasture thereon.

Your petitioners offer to present testimony before your honor, should you deem necessary, to prove the facts herein stated, at such time as your honor shall designate for the purpose.

Your petitioners pray that their title to said tract of land be investigated and approved to the inhabitants thereof, according to the respective rights of the original grantees and their heirs and legal representatives; that the same be confirmed by the Congress of the United States under the treaty of Guadalupe Hidalgo and the law of Congress of July 22, 1854, establishing your office, and that the land be surveyed and set apart to them by the Government.

SAML. ELLISON,
*Attorney for Claimants.*

It is insisted that the act of possession, dated September 22, 1824, and the unsigned and undated list of allotments were the documents referred to in the foregoing petition on behalf of the inhabitants of the town of Vallecito, and came into the custody of the surveyor-general at that time, and were not part of the original archives, as were the petition and unsigned draft of the order for possession. (See testimony of Merejildo Martinez (R., 61, 62), and Antonio de Vargas (R., 71, 72), and the testimony of Dionicio Vargos before the surveyor-general on May 20, 1875 (R., 53).)

As the original list of allotments is before this court, we have had Mr. Tipton make a careful examination of the same with a view of determining exactly what had been written. The result of Mr. Tipton's examination is found in a correct copy of the Spanish and translation thereof and attached to this brief as an appendix. It will be noted that the erasures contained in the original are printed in italics in the copy and translation.

A large amount of testimony was offered by claimants to connect themselves with some of the original allottees, either by deed or inheritance.

The patent and plat of the Tierra Amarilla grant, which partially conflicts with this grant, was introduced in evidence by the defendants the United States Land and Colonization Company and Thomas B. Catron (R., 73–89).

The Government introduced no oral evidence on the trial, except upon the question of the location of the natural object named as the west boundary.

It was contended on behalf of the Government:

First. That the documents offered in evidence by claimants were not sufficiently authenticated to establish their genuineness, and that, if sufficiently and satisfactorily authenticated, they do not purport to grant any land or pass any interest therein, but only a permissive possession preliminary to a grant which was never obtained.

Second. That the officials of New Mexico did not possess the power and authority to dispose of the vacant public land subsequent to the repeal of the imperial colonization law of January 4, 1823, until the issuance of the executive regulations of November 21, 1828.

Third. If the four documents offered as evidence of title were sufficiently authenticated and did pass an interest in the land, it was only to the specific allottees in severalty for the amount allotted each, and the *jus dispondi* of the remainder continued in the Government and was by the treaty transferred to the United States, and the claim comes within the rule announced by this court in the following cases:

*United States* v. *City of Santa Fe*, 165 U. S., 675.
*United States* v. *Sandoval et al.*, 167 U. S., 278.
*United States* v. *Rio Arriba Land and Cattle Co.*, *Ibid.*, 298.

The Court of Private Land Claims rejected the grant upon the ground that there was no satisfactory evidence that a grant had been executed, and dismissed the petition, and in due time S. Endicott Peabody appealed the case to this court.

The other plaintiffs and claimants below did not join in the appeal, and seem to have taken no interest or part therein.

## ARGUMENT.

### I.

*The instruments presented as evidence of title do not purport to convey any interest in the property.*

Construing the first three together—to wit, petition, unsigned order for possession, and act of possession—they clearly indicate no present interest was intended to pass.

Assuming for the purpose of this point that the unsigned order has been properly authenticated and foundation laid for its admission as secondary evidence, it clearly is against the contention of counsel for appellant and renders untenable the position that the act of possession was sufficient evidence of the grant.

The following is a recent translation by Mr. Tipton of the unsigned order for possession known as archive "898:"

> In virtue of your report you may proceed to place Jose Rafael Samora, with the twenty-five persons who join him in his petition, in possession of the lands he asks for, in order that they may not lose time in going to work; nor shall you act with the necessary formalities, which can not be had now on account of the most excellent deputation, to which body the matter belongs, not being in session.
>
> I enjoin upon you that in placing them in possession you treat these unfortunate persons with charity, charging them for your work in proportion to their adverse circumstances rather than according to the tariff of fees that is in force.
>
> God, etc., February 27, 1824.
>
> To the Alcalde of Abiquiu.

The act of possession (R., 42, 43) seems not to have been executed with that haste the unsigned draft of the order for possession seemed to require. It bears date September 22, 1824, but recites that it was made by virtue of the decree of Bartolomé Baca, actual (present) political chief of this province, given at Santa Fe on the 27th of February, 1824, and this delayed act of possession clearly shows that it was not intended to convey any present interest, but only a permissive possession.

The alcalde, in the body of this report, says:

> And having examined the said land and seeing its extent and proportions, the parties interested being present and *others who joined them according to the list they presented*, all having agreed among themselves that at no time there should be interruptions or differences among them, I measured off to each one at the rate (de á) fifty varas to some, in conformity with the extent of the land, to others one hundred varas, and one hundred and fifty varas to the said Jose Rafael Samora, as principal petitioner; with which distribution they remained well contented and satisfied, there remaining free the so-called Badito and cuestecita for a common watering place, and in the center of the canoncito to the lands called those of *Juan Benito Sanches*, having for the site of the plaza one hundred and fifty varas, the limits of said distributed land being, on the east, the mesa of the Zorita; on the west, the cuchilla called del Valle de los Caballos; on the north, the course of the said river, and on the south, the Badito, where the grant joins Juan Galbis, there being no one who contradicted or made any demands as to injury in the distribution of the land; and that this common distribution may appear as made to these residents and citizens I charged them to endeavor to fortify

> themselves for their own defense; to cultivate and advance agriculture for their own benefit by forming a considerable settlement as provided by the laws, giving them to understand that as new colonists they shall exert themselves, not being authorized to exchange, sell, or alienate the same until they shall have acquired title or have sufficient time to do so; and should any, before the termination of this time, for their own particular convenience or for increasing their land, wish to go and settle another place they remain notified that they shall renounce this grant in order to be admitted in another, having to present this document to the political chief in order that he may approve, reform, or determine that which he may deem proper.

It would seem that such recitals in an act of possession, either under an order of the political chief, such as the unsigned draft, or in the total absence of any evidence of what it was, can hardly be called "*juridical*" in the sense that that term is used in Spanish and Mexican land laws, and carries with it no presumption in favor either of its genuineness or subsequent approval.

For appellant to sustain this claim as a grant passing such an interest that the Mexican Government could not disavow but was bound to recognize, not as a matter of grace, but as a matter of right (sec. 13, subsec. 1, act 1891), a remarkably free indulgence in the doctrine of presumption is necessary, and is contrary to the recitals contained in the documents introduced by appellant in the court as evidence of title, which seem as inadmissible as in *Bergere* v. *United States* (168 U. S., 66, 75).

The presumptions in which this court is called upon to indulge are numerous.

First. That the political chief of the province on February 24, 1824, made a grant in form to Samora and twenty-five others.

Second. That the act of possession dated September 22, 1824, was executed in conformity with such unknown granting decree.

Third. That such act of possession was returned to the political chief and approved by him or other lawful authority.

Fourth. That he possessed the power and authority on February 24, 1824, to make a definitive grant in the first instance, and possessed the power and authority in September to make a definitive grant upon permissive possession given under an undisclosed order of the political chief made on February 24, 1824.

It is further contended by the United States that the evidence clearly shows that the act of possession and the list of allotments were never part of the archives.

First. They do not bear any evidence of ever having received any archive number, as did the petition and unsigned draft of the order for possession, which are separate and distinct documents; and it is probable had they been part of the archives they would have received the number "898."

Second. The petition filed on behalf of the inhabitants of the town of Vallecito on May 20, 1875, under the law of July 22, 1854, states:

> That your petitioners herewith file the original and sworn translation of the original *documents* constituting their title and also refer to document number 898 among said archives of your office, as corroboration of said title, which document No. 898

your petitioners pray may be taken from among said archives and placed with and made a part of said claim.

This was done, as appears by the indorsement on the cover inclosing archive 898.

Quere: What documents, save the act of possession and list of allotments, were referred to in that petition?

Third. Merejildo Martinez, one of the claimants, testified he had seen the grant document of Vallecito in possession of Antonia Trujillo. (R., 61, 62.) (Testimony of Antonio de Vargas; R., 71, 72.)

Fourth. The act of possession seems to have been left with the persons placed in possession, probably at Samora, in order that it might be returned to the political chief for his action as provided at the conclusion thereof.

Nothing appears to show that it was returned, but the petition presented to the surveyor-general on May 20, 1875, and the testimony of Martinez and Vargas would indicate that it was one of the documents presented at that time. Had it been returned to the political chief he probably would have made some indorsement thereon of his approval, disapproval, or reference to the excellent deputation for its action.

It is believed, admitting, *arguendo*, the full force that can be given to all the muniments of title in the record, it was a permissive possession which never ripened into a grant entitled to recognition under the law of March 3, 1891; and the claim is clearly within the principles announced in various decisions of this court upon claims for confirmation based upon permissive possession preliminary to grant.

In the case of *De Haro* v. *United States* (5 Wall., 599), it was held that the decree of the governor was a naked license to occupy the land provisionally, and that the instrument conveyed only a license uncoupled with an interest and a grant.

A claim for land resting upon a license of this character is not entitled to confirmation under the act of Congress of March 3, 1851.

The unsigned order (R., 41, 42) and the act of possession (R., 42, 43), both show the possession was preliminary to title being afterwards acquired, which does not appear to have been obtained, and hence, under the provisions of the act of Congress of March 3, 1891, is not entitled to confirmation. (*United States* v. *Baltimore*, 98 U. S., 424.)

Mr. Justice Davis, for the court, in the *De Haro Case* (5 Wall., 627), says:

> There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act which without it would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and can not be transferred or alienated by the licensee, because it is a personal matter and

> is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of the difference between the civil and common law on this subject. * * * The continued possession by the father and those under him estops no one, certainly not a sovereign power like Mexico or the United States.

In the case of *Serrano* v. *United States* (5 Wall., 451, 461), wherein it was insisted that if the legal title should fail, yet the notorious and long-continued possession establishes an equitable one, it was held that—

> The actual possession in this case was limited to a very small quantity of ground; but, conceding that it embraced 5 leagues, no equities attached to it, considering the manner in which it was obtained and continued. There is no adverse holding here, but the possession was a permissive one and consistent with the proprietary interests of Spain and Mexico; and the fact that those Governments did not terminate the possession, which was a mere tenancy at will, can not create an equity entitled to confirmation. Serrano held under a license to occupy, and that license could be revoked at any time. The failure to revoke it can not change the original character of the possession into an adverse one. If Serrano had entered into possession under a claim of right, and had title papers, though imperfect, he might say that the length of his possession entitled him to the favorable consideration of the court. Not so, however, where he had

no interest in the land, never applied for any, either to Spain or Mexico, and was content with a permission to occupy it for the purpose of pasturage.

It is admitted by appellant's counsel that he "must rely upon the undoubted act of juridical possession for evidence of making of the grant by the governor," and he contends that "the familiar doctrine of presumption in favor of the regularity of official acts is undoubtedly applicable." It is not, however, admitted by the Government that the instrument called the act of juridical possession carries with it any probative force or presumption that the political chief (governor) ever authorized it, or that it was signed and executed by anyone authorized to bind the former Government. There is no evidence in its favor upon which a presumption can be predicated, because:

1. It is produced from private hands and does not appear to have been returned to the political chief.

2. Internal evidence contained in the instrument clearly shows no title, either perfect or imperfect, was expected or intended to pass thereby, as the alcalde gave the allottees to understand that they were not "authorized to exchange, sell, or alienate the same until they shall have acquired title or have sufficient time to do so, and should any before the termination of this time, for their own particular convenience or for increasing their land, wish to go and settle another place, they remain notified that they shall renounce this grant in order to be admitted in another, having to present this document to the political chief in order that he may approve, reform, or determine that which he may deem proper." (R., 42.)

Such recitals are fairly referable to orders previously received from the political chief, and under limitations prescribed by him. The allottees having been made the custodians of the same, must be held to account for its presentation with the petition as evidence of title. If, however, it was returned subsequent to September 22, 1824, as required by its terms, for action by the political chief, no steps seem to have been taken by the officials of the Republic of Mexico as to the approval, reformation, or other determination which was required before any estate passed. Had it been properly returned, it is likely that some indorsement would have been on it or some instrument issued to those returning it to the political chief, as evidence of title, if any estate was intended to be vested. It is true that the archives have been poorly preserved and little reliance can be placed upon them as to what they formerly contained, still such rulings as have been repeatedly insisted upon in many cases presented under the act of 1891, by reason of their spoliation and without any evidence even of a secondary nature to show some connection between the lost archives and the instrument and claim before the court, would place a judicial premium upon suppression of evidence in private possession and foster a designed indifference to any attempt to discover some connection between the archives and the grant, relying upon the safer general inference to be drawn from the total absence of any evidence by record of a final grant, and presuming that all the restrictions and limitations specified in the seventh and tenth sections of the act of 1891 have been fully met.

The general rule which should apply seems to be that testimonios or muniments of title delivered to a private party as evidence of titie from the sovereign under all governments presupposes a record, and such muniments are only of the nature of letters patent. The record is the basis of such testimonios and letters patent. If it does not appear affirmatively that such record exists, the essential superstructure must be erected by the plaintiff that such records have been lost or destroyed, and some connection must be shown between the lost records and the grant, so that its verity can be fairly determined in the affirmative; otherwise the entire case should fail for want of legal proof.

*Romero* v. *United States*, 1 Wall., 721.
*Peralta* v. *United States*, 3 Wall., 434, 440.
*Pico* v. *United States*, 2 Wall., 279.
*United States* v. *Cambuston*, 20 How., 59.
*United States* v. *Sutter*, 21 How., 175.
*Fuentes* v. *United States*, 22 How., 443.
*United States* v. *Teschmaker*, 22 How., 392, 405.
*United States* v. *Castro*, 24 How., 346.
*United States* v. *Neleigh*, 1 Black, 298.
*United States* v. *Vallejo*, ibid., 541.

The recital of the alcalde in the act of possession in the Petaca grant, now before this court in the case of *United States* v. *Pena et al.*, No. 293, October term, 1898, that it was bounded on the west by "the boundary of the Valecito grant" (R., 90), does not furnish evidence of a grant to Samora and others. Even had the recital been made by the political chief in a granting decree it would have been insufficient to establish a grant or its character or a

compliance with the formalities requisite to vest an interest in the land which can be judicially recognized under the limitations of the law of March 3, 1891.

Sections 7, 13, act of 1891.
*United States* v. *Teschmaker*, 22 How., 404.
*United States* v. *Castro*, 24 How., 346.

Permissive or provisional possession, such as in this case, furnishes no evidence of the grant, its form, requirements, nor of its record, and under such possession of small quantities of land in severalty, it is now sought to interpose the legal presumption that the grant is one which appears to be "upon a title lawfully and regularly derived from the Government of Spain or Mexico," and one that, if not complete and perfect at the date of the acquisition of the territory by the United States, the claimants would have had a lawful right to make perfect had the territory not been acquired by the United States (sec. 13, subsec. 1, act of 1891); that it had reached that point in the proceedings where the former Government could not lawfully disavow it and hence estop the former sovereign power, and necessarily the United States.

It is not believed that the case is entitled on the evidence to any status under the limitations of the act of 1891, and the Court of Private Land Claims did not err in holding that the claim had not been established by full legal proof upon the hearing.

II.

*From April 11, 1823, to November 21, 1828, there was no power or authority in any official or official body in New Mexico to dispose of the vacant public lands.*

The petition by Samora and his associates is dated February 23, 1824, and the unsigned draft of the order for possession is dated February 27, 1824. The act of possession is dated September 22, 1824, and by its terms does not purport to pass any vested interest which the Mexican Government was bound to recognize as a matter of right or which it could not lawfully disavow, so that no such disposition by way of grant is disclosed by the evidence in this case. The historical status of the Government from the Declaration of Independence on February 24, 1821, to November 21, 1828, has been under consideration by this court in a number of cases, particularly in *Hays* v. *United States*, 170 U. S., 637, and *Ely's administrators* v. *United States*, 171 U. S., 220.

It is well to note that the transfer of title under consideration in the latter case was initiated on May 29, 1821, and the expediente concluded on November 12, 1821, upon which date the record disclosed payment of the purchase money for $1\frac{3}{4}$ sitios of land. Final title was not issued on this expediente until May 15, 1825, by Juan Riesgo, commissary-general. In discussing the departures from the ordinance of intendants, Mr. Justice Brewer (p. 226), referring particularly to the departure under the imperial colonization law of January 4, 1823, says:

> It may be well here to note that the colonization law was not passed until after the sale in controversy had taken place.

And for the purposes of this case it is thought sufficient to treat the imperial colonization law of January 4, 1823, as the date at which all former laws for the disposition

of the vacant public lands by the provincial officers ceased to have any force in Mexico. This law was certainly in force during the reign of General Iturbide, and until April 11, 1823, when the constituent congress suspended the same, with a saving clause in favor of Austin, until a new resolution on the subject should be enacted (1 White's Recop., 594; Reynolds, 108), and is translated in the following language:

> In this (order) the Government is instructed, if it does not find it inexpedient, to accede to the application of Stephen Austin to confirm his concession to establish 300 families in Texas; to act upon other applications of like nature, and to suspend until a new resolution the colonization law enacted by the instituent council (junta).

No other resolution is found upon the subject until the passage of the colonization law of August 18, 1824, which, as to the Territories, was not self-enforcing and required regulations to be issued by the chief executive on the subject before the Territorial officials could lawfully intervene in the disposition of the vacant public lands. The executive did not issue such regulations until November 21, 1828. Considering these various provisions under the decisions of the Hays and Ely cases, it would seem to follow that neither the political chief nor provincial or Territorial deputation could lawfully dispose of the vacant public lands in New Mexico between April 11, 1823, and November 21, 1828.

*Hays* v. *United States*, 170 U. S., 637.
*Ely's administrators* v. *United States*, 171 U. S., 220.

The legal presumption of the existence of power from the fact of its exercise is fully discussed in these cases and held inadmissable under the terms of the act of 1891, and the distinction clearly drawn between the controlling limitations prescribed by that statute and those for settlement of land titles under the Florida and California acts. Almost every decision rendered in cases appealed from the Court of Private Land Claims to this court holds against the indulgence in such presumptions under the present law, which were permitted in many instances under the Florida and California acts.

Giving to the instruments offered as evidence of title the force that can fairly be asked for them, no grant of any vested interest was ever made and no permissive or provisional possession seems to have been given until September 22, 1824, after the colonization law of August 18, 1824, had become the law of the land, and the evidence of an attempted exercise of power, either lawful or unlawful, on the part of the Territorial officials is wanting in this case.

## III.

The appeal is being prosecuted alone by Peabody, and udging from the amended petition filed in his behalf (R., 12-15) it is evident he seeks to have the decree of the Court of Private Land Claims reversed and a confirmation to himself as the legal successor in interest of José Rafael Samora, the only individual whose name is disclosed by the petition itself, although it purports to have been made by Samora for himself and "twenty-five

individuals of the same district," in pursuance of a contention that Samora was vested with the title to the entire tract, subject to such equitable rights as those who accompanied him, though unnamed, and their legal representatives might be able to charge him with in the local courts as confirmee.

The appellant, Peabody, stands in exactly the same position occupied by Morton as the legal representative of Lorenzo Marquez, the original and only named petitioner disclosed by the petition made for the San Miguel del Bado grant. (*United States* v. *Sandoval*, 167 U. S., 278, 283.) In neither instance was the list of the individuals accompanying the respective petitioners given, nor was it made to appear who they were until after the execution of the act of possession by the alcalde. The act of possession, however, in the case at bar is much more specific in its recitals as to allotments than in the San Miguel del Bado grant case, although the individuals are not named, save the petitioner. Subsequently, however, in each case a list of the allottees was made out. It is true that the list of allottees in the present case is unsigned and undated, yet it is fairly referable to the recitals contained in the act of possession, although it is contended by the appellant that the amount of land set forth in the allotment does not correspond to the quantity of land contained in the act of possession. As suggested before, in the original list of allotments there is a number of erasures and the figures were evidently poorly made. After a careful examination of it, there is attached hereto as an appendix a copy and translation of this list, made

by Mr. Tipton, in which the amount of land allotted fairly conforms to the amount suggested in the act of possession. However, allotments were evidently made by the alcalde, as appears by the act of possession, and as this list must have been presented to the surveyor-general under the law of July 22, 1854, with the original petition filed on behalf of the inhabitants of the town of Vallecito, it is thus made to appear that there were other allottees than Jose Rafael Samora, and their identity disclosed.

It is apparent from the recitals of these muniments of title that it was an attempt to hurriedly establish a town at Vallecito, and the allotments made were not to be considered as passing an estate until after they had received some affirmative action on behalf of the political chief, as suggested in the act of possession. In this respect it differs from the act of possession in the San Miguel del Bado Case. In neither event did such an interest pass to any land as will enable Peabody, as the legal representative of Samora, to obtain the title in trust for himself and the others as their interests might hereafter appear, for that no community of interest existed between Samora and any of the allottees, whatever their grade of title may have been, and as to all of the unallotted lands the *jus disponendi* remained in the Mexican Government and at the cession of the territory passed to the United States.

It is contended that in no event is the grant entitled to confirmation for the whole or any part of it, for the reason that as to the allotments there was no community of interest, and as to the unallotted lands, the title is

still in the United States, and for this point the case clearly falls within the rule established in—

*United States* v. *Sandoval*, 167 U. S., 278.
*Rio Arriba, etc., Company* v. *United States*, 167 U. S., 298.
*United States* v. *Santa Fe*, 165 U. S., 675.

Respectfully submitted.

JOHN K. RICHARDS,
*Solicitor-General.*

MATTHEW G. REYNOLDS,
*Special Assistant to the Attorney-General.*

# APPENDIX.

[The italics indicate words which in the original document appear to be attempted erasures.]

*Lista de los ynderidos que conprenden ha esta merse del vayesito que comunmente yaman de Lorato y son como sigen.*

| | |
|---|---|
| Tomas Chacon unas sovras | |
| Pumuseno Estrada | 150 |
| Juan Siriaco Garcia | 150 |
| Fransisco Archuleta | 150 |
| Manuel Archuleta | 200 |
| Juan de Dios Trugio | 200 |
| Juan Christoval Quintana de una vanda | 300 |
| Juan Benito Sanches | 200 |
| Juan Samora de una vanda | 150 |
| Manuel Samora y Jose Samora una vanda desde el lindero del dicho Sanches hasta el Cañonsito Jose Martin desde onde comiensa el cañonsito del lado de ariva hasta el lindero a Franco Valdes el dicho Franco Valdes sien | 100 |
| Rafael Valdes | 100 |
| Juan Felipe Naranjo | 100 |
| Manuel Martin | 100 |
| *Rafael Samora Antonio Jose Lucero* | 100 |
| Manuel Marques | 100 |
| *Carlos Valdes* Franco Gallegos | 100 |
| Antonio Domingo Garcia | 100 |
| Jose Manuel Valde | 100 |
| Jose Rafael Salas | 100 |
| *Juan Lorenso Martin* Franco Trugiyo | 100 |
| Jose Rafael Samora | 125 |
| Juan Pedro Samora | 100 |
| Migel Samora | 100 |

Siento sinquenta de una vanda y tra libres para qe se aga la plasa .....

Juan de los rreyes Sena ..... 100
*Jose Gayego* Franco. Trugillo ..... 100
Rafel Valverde ..... 100
Pedro Valverde ..... 100
*Jose Grabiel Quintana* Franco. Espinosa ..... 100
Grabiel Espinosa ..... 100
Jose Antonio Gonsales ..... 100
Manuel Silvestre Trugio ..... 100
*Migel Maes* Juan Manul Olgin ..... 100
*Jose Quintana* Martin Bigil ..... 100
*Juan de Jesus Fernandes* Manul Chaves ..... 100
Manuel de Jesus Salasar ..... 100
Franco. Trugio ..... 100
Juan de Jesus Chaves ..... 100
Franco. Estevan Chaves ..... 100
*Grabiel Quintana* Juan Senon Trugillo ..... 100
Migel Sena ..... 100
Jose Ortis ..... 100
Juan de Jesus Abila ..... 100
Bartolo Chaves ..... 100
Juan de Jesus Martin ..... 100
Manuel de Jus Trugio ..... 100
*Bisente Lucero* Juan Agustin [illegible] ..... 100
Lonisio Vegil ..... 100
Jose Fransisco Serda ..... 100
Juana Angela Samora ..... 100
Matias Gonsales ..... 100
Bisente Lusero .....
*Ysidro Trugillo* Juan Senon Trugillo ..... 100
*Martin Begil* ..... 100

[Translation.]

*List of the persons who compose this grant of the Vallecito, which they commonly call Lovato's, and they are as follows:*

Tomas Chacon, some overpluses ..... ——
Pumuseno Estrada ..... 150
Juan Siriaco Garcia ..... 150

Francisco Archuleta ..... 150
Manuel Archuleta ..... 200
Juan de Dios Trugio ..... 200
Juan Christoval Quintana, on one bank ..... 300
Juan Benito Sanches ..... 200
Juan Samora, on one bank ..... 150
Manuel Samora and Jose Samora, on one bank from the boundary of the said Sanches as far as the little canyon .....——
Jose Martin, from where the little canyon begins on the upper side as far as the boundary of Francisco Valdes .....——
The said Francisco Valdes, one hundred ..... 100
Rafael Valdes ..... 100
Juan Felipe Naranjo ..... 100
Manuel Martin ..... 100
*Rafael Samora, Antonio Jose Lucero* ..... 100
Manuel Marques ..... 100
*Carlos Valdes,* Francisco Gallegos ..... 100
Antonio Domingo Garcia ..... 100
Jose Manuel Valde ..... 100
Jose Rafael Salas ..... 100
*Juan Lorenso Martin,* Francisco Trugiyo ..... 100
Jose Rafael Samora ..... 125
Juan Pedro Samora ..... 100
Miguel Samora ..... 100
One hundred and fifty on both banks free, in order that the plaza may be laid out.
Juan de los Reyes Sena ..... 100
*Jose Gayego* Francisco Trugillo ..... 100
Rafel Valverde ..... 100
Pedro Valverde ..... 100
*Jose Grabiel Quintana* Francisco Espinosa ..... 100
Grabiel Espinosa ..... 100
Jose Antonio Gonsales ..... 100
Manuel Silvestre Trugio ..... 100
*Migel Maes* Juan Manuel Olgin ..... 100
*Jose Quintana* Martin Bigil ..... 100
*Juan de Jesus Fernandes* Manul Chaves ..... 100
Manuel de Jesus Salasar ..... 100
Francisco Trugio ..... 100
Juan de Jesus Chaves ..... 100